HARVARD

LAW REVIEW.

VOL. XI. DECEMBER, 25, 1897. NO. 5.

THE HISTORY OF TROVER.

THE classic count in trover alleges that the plaintiff was possessed, as of his own property, of a certain chattel; that he afterwards casually lost it; that it came to the possession of the defendant by finding; that the defendant refused to deliver it to the plaintiff on request; and that he converted it to his own use, to the plaintiff's damage. And yet throughout the history of this action the last of these five allegations has been the only one that the plaintiff must prove. The averments of loss and finding are notorious fictions, and that of demand and refusal is surplusage, being covered by the averment of conversion. Under the first allegation the plaintiff need not prove that the chattel was his own property, or that he was in actual possession of it. It is enough to show actual possession as a bailee, finder, or trespasser, or to prove merely an immediate right of possession.

A greater discrepancy than that here pointed out between a count and the evidence required to support it can hardly be found in any other action. But it is generally true that averments in pleading, however inaccurate, superfluous, or fictitious they may be at a given time, were once accurate and full of legal significance. The count in trover is no exception to this rule. To make this clear, however, it is necessary to consider in some detail the remedies at the command of the plaintiff, in early Eng-

lish law, for the asportation, detention, or destruction of chattels. These remedies were the four actions, known as Appeals of robbery or larceny, Trespass, Replevin, and Detinue.

Appeal of Robbery or Larceny.

For a century after the Norman Conquest there was no public prosecution of crime. Proceedings against wrong-doers, whether criminals or mere tort-feasors, depended upon the initiative of the parties injured, and took the form of private actions. These actions, in the royal courts, were called appeals, and, in their final development, fell into three classes: (1) the compensatory appeals, *i. e.*, appeals of battery, mayhem, and imprisonment, in which the appellor recovered damages; (2) the punitory appeals, *i. e.*, appeals of homicide, rape, arson, and also robbery or larceny of chattels worth 12*d.* or more, where the stolen chattels could not be recovered, in which the punishment of the defendant was the sole object; [1] (3) the recuperatory appeals of robbery or larceny, in which the appellor sought to recover the stolen chattels as well as to discover and punish the thief. It is with this class of appeals that we are concerned in this paper.

The procedure in the Anglo-Norman period is described by Glanvil, Bracton, Britton, and Fleta.[2] Britton's account is the fullest. The victim of the theft upon the discovery of his loss raised hue and cry, and with his neighbors made fresh pursuit after the thief. If the latter was caught, on fresh pursuit, with the "mainour," *i. e.*, with the pursuer's goods in his possession, the case was disposed of in the most summary manner. The prisoner was taken at once to an impromptu court, and if the pursuer, with others, made oath that the goods had been stolen from him, was straightway put to death, without a hearing, and the pursuer recovered his goods. Britton's statement is borne out by several reported cases.[3]

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[1] "This appeal is not a real or personal action . . . the woman (appellor) is seeking vengeance for the death of her husband." Y. B. 9 Hen. IV. f. 2, pl. 8. The compensatory appeals, in their origin, were likewise actions for vengeance. 1 Nich. Britt. 124; Fleta, Lib. I. cap. 40, 42; Y. B. 18 Ed. III. f. 20, pl. 31; 2 Pollock & Maitland, Hist. Eng. Law, 487.

[2] Glanvil, Bk. 10, ch. 15–17; Bract. 150 b–152; 1 Nich. Britt. 55–60; Fleta, Lib. I ch. 38; see also Mirror of Justices, Seld. Soc'y, Bk. III. c. 13.

[3] Northumberland Assize Rolls, 79 (40 Hen. III.). "Stephanus de S . . . captus fuit cum quodam equo furato per sectam Willelmi T. et decollatus fuit, praesente bal-

If not taken freshly on the fact, the person found in possession of the chattel had a right to be heard. The appellor, placing his hand upon the chattel,[1] charged the appellee with the theft. There were several modes of meeting the charge. The appellee might deny it *in toto*. The controversy was then settled by wager of battle, unless the appellee preferred a trial by jury.[2] The chattel went to the winner in the duel.

The appellee might, on the other hand, claim merely as the vendee or bailee of a third person. He would then vouch this third person as a warrantor to appear and defend the appeal in his stead. Glanvil gives the writ to compel the appearance of the warrantor.[3] If the warrantor failed to appear, or, appearing, successfully disputed the sale or bailment by wager of battle,[4] the appellor recovered the chattel, and the appellee was hanged. If the appellee won in the duel with the vouchee, the vouchee was hanged.[5] If the warrantor came and acknowledged the sale or bailment, the chattel was put temporarily in his hands, the appellee withdrew from the appeal, and the appellor thereupon appealed the warrantor as the thief, or with the words that he knew no other thief than him.[6] The warrantor might in his turn vouch to warranty or dispute the appellor's right. If the appellor was finally successful against any warrantor, he recovered the chattel. If he was unsuccessful, the chattel was restored to the original appellee. This vouching to warranty is to be regarded as the following up of the trail of the thief, whose capture is an essential object of the whole procedure.

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livo domini Regis, et praedictus equus deliberatus fuit praedicto W. qui sequebatur pro equo illo in pleno comitatu." In 1271 one Margaret appealed Thomas and Ralph for killing her brothers. But she was imprisoned for her false appeal, since Thomas and Ralph, who had pursued and beheaded her brothers as thieves taken with the "mainour," had acted according to the law and custom of the realm. Pl. Ab. 184, col. 1, rot. 24. This custom was condemned by the justices, in 1302, who said that one who had beheaded a manifest thief should be hanged himself. Y. B. 30 & 31 Ed. I. 545. See 2 Pollock & Maitland, Hist. Eng. Law, 495.

1 Bract. Note Book, No. 824.

2 As early as 1319 the rule was established that a thief taken with the "mainour" could not defend an appeal by wager of battle. but must put himself upon the jury; "for the appeal has two objects, to convict the thief and to recover the stolen chattel, and the law recognizes that the thief, though guilty, might by bodily strength vanquish the appellor and thus keep the chattel without reason." Fitz. Cor. 375. See also Fitz. Cor. 157, 125, 100, 268.

3 Book X. ch. 16.

4 Sel Pl. of Crown, 1 Seld. Soc'y, No. 124.

5 Bract. Note Book, No. 1435.

6 Sel. Pl. of Crown, 1 Seld. Soc'y, No. 192; Bract. Note Book, No. 67.

The appellee might, thirdly, though having no one to vouch as a warrantor, claim to have bought the chattel at a fair or market. Upon proof of this he was acquitted of the theft; but the appellor, upon proof of his former possession and loss of the chattel, recovered it. There was, as yet, no doctrine of purchase in market overt.

This private proceeding for the capture of the thief and recovery of the stolen chattel, as described in English law treatises and decisions of the thirteenth century, is of Teutonic origin. Its essential features are found in the Salic law of the fifth century; [1] but by the middle of the thirteenth century this time-honored procedure had seen its best days. The public prosecution of crime was introduced by the Assize of Clarendon in 1166, and with the increasing effectiveness of the remedy by indictment, the victims of robbery or theft were more and more willing to leave the punishment of wrong-doers in the hands of the Crown. On the other hand, the path of him who would use the appeal as a means of recovering the chattel stolen from him was beset with difficulties.

The appellor must, in the first place, have made fresh pursuit after the thief. In 1334 it was said by counsel that if he whose goods were stolen came within the year and a day, he should be received to have back his chattels. But Aldeburgh, J., answered: "Sir, it is not so in your case, but your statement is true in regard to waif and estray." [2]

Secondly, the thief must have been captured by the appellor himself or one of his company of pursuers. In one case the owner of the stolen chattel pursued the thief as far as a monastery, where the thief took refuge in the church and abjured the realm. Afterward the coroner delivered the chattel to the owner because he had followed up and tried to take the thief. For having foolishly delivered the chattel the coroner was brought to judgment before the justices in eyre.[3] So if the thief was arrested on suspicion

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[1] Sohm, Der Process d. Lex. Salica; Jobbé-Duval, La Revendication des Meubles; Brunner, Rechtsgeschichte, I. 495 *et seq.*; Schroeder, Lehrbuch d. deutschen Rechtsgeschichte, 346 *et seq.*

[2] Y. B. 8 Ed. III. f. 10, pl. 30, See also Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 7 Hen. IV. f. 31, pl. 16; Y. B. 7 Hen. IV. f. 43, pl. 9; Roper's Case, 2 Leon. 108. In a case cited in Sel. Pl. Ct. Adm. 6 Seld. Soc'y, XL., restitution was ordered in the Admiralty Court "because by the law maritime the ownership of goods taken by pirates is not divested unless the goods remain in the pirates' possession for a night." See also Y. B. 7 Ed. IV. f. 14, pl. 5; and compare Y. B. 22 Ed. III. f. 16, pl. 63.

[3] Y. B. 30 & 31 Ed. I. 527.

by a bailiff, the king got the stolen chattel, because the thief was not arrested by the party.[1]

Thirdly, the thief must be taken with the goods in his possession. If, for instance, the goods were waived by the thief and seized by the lord of the franchise before the pursuers came up, the lord was entitled to them.[2]

Fourthly, the thief must be convicted on the pursuer's appeal. "It is coroner's law that he, whose goods were taken, shall not have them back unless the felon be attainted at his suit."[3] In one case the verdict in the case was not guilty, and that the appellee found the goods in the highway. The goods were present in court. It was asked if the goods belonged to the appellor, and found that they did. Nevertheless, they were forfeited to the king.[4] In another case the thief was appealed by three persons for different thefts. He was convicted upon the first appeal and hanged. The goods of the two other appellors were forfeited to the king.[5] The result was the same if the pursuer's failure to convict was because the thief rather than be taken killed himself,[6] or took refuge in a church and abjured the realm,[7] or died in prison.[8]

Finally, since the rule which denied the right of defence by wager of battle to one taken with the "mainour" seems not to have been established before the fourteenth century,[9] the appellor was exposed to the risk of defeat and consequent loss of his chattels by reason of the greater physical skill and endurance of the appellee. There was the danger, also, that an appellee of inferior physical ability might fraudulently vouch as a warrantor an expert

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[1] Fitz. Cor. 379 (12 Ed. II.). See also Y. B. 30 & 31 Ed. I. 509; Y. B. 30 & 31 Ed. I. 513; Fitz. Cor. 392 (8 Ed. II.); Fitz. Cor. 190, criticising Y. B. 26 Lib. Ass. 17.

[2] Dickson's Case, Hetley, 64. But see Rook and Denny, 2 Leon. 192.

[3] Y. B. 8 Ed. III. f. 10, pl. 30; Fitz. Avow. 151, per Schardelow, J.

[4] Fitz. Cor. 367 (3 Ed. III.).

[5] Y. B. 44 Ed. III. f. 44, pl. 57; Fitz. Cor. 95. But see Y. B. 7 Hen. IV. f. 31, pl. 16, Fitz. Cor. 21; and compare Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26.

[6] Fitz. Cor. 318 (3 Ed. III.).

[7] Y. B. 30 Ed. I. 527; Fitz. Cor. 162 (3 Ed. III.). But see Fitz. Cor. 380 (12 Ed. II.) *semble*, and Y. B. 26 Lib. Ass. 32, Fitz. Cor. 194 (*semble*), *contra*.

[8] Y. B. 4 Ed. IV. f. 11, pl. 16, Fitz. Cor. 26. But see *contra*, Fitz. Cor. 379 (12 Ed. II.) and Fitz. Forf. 15 (44 Ed. III.). In the last half of the fourteenth century this rule was so far relaxed that the pursuer might recover his chattels if the conviction of the thief was prevented by his standing mute. Y. B. 26 Lib. Ass. 17; Y. B. 44 Lib. Ass. 30; Y. B. 8 Hen. IV. f. 1, pl. 2, Fitz. Cor. 71; or claiming benefit of clergy: Y. B. 1 Hen. IV. f. 4, pl. 5; Y. B. 10 Hen. IV. f. 5, pl. 18, Fitz. Cor. 466; Y. B. 2 R. III. f. 12, pl. 31; Y. B. 3 Hen. VII. f. 12, pl. 10.

[9] *Supra*, n. 2, p. 279.

fighter, who, as a paid champion, would take the place of the original appellee. To avoid the duel with this champion, the appellor must establish by his *secta* or by an inquest that the ostensible warrantor was a hired champion.[1]

It is obvious from this account of the appeal of robbery or larceny that the absence of pecuniary redress against a thief must sooner or later become an intolerable injustice to those whose goods had been stolen, and that a remedy would be found for this injustice. This remedy was found in the form of an action for damages, the familiar action of

Trespass de Bonis Asportatis.

The recorded instances of trespass in the royal courts prior to 1252 are very few. In the "Abbreviatio Placitorum" some twenty-five cases of appeals of different kinds are mentioned, belonging to the period 1194–1252, but not a single case of trespass. In the year 37 Henry III. (1252–1253) no fewer than twenty-five cases of trespass are recorded, and from this time on the action is frequent, while appeals are rarely brought. It is reasonable to suppose that the writ of trespass was at first granted as a special favor, and became, soon after the middle of the fourteenth century, a writ of course.

The introduction of this action was a very simple matter. An original writ issued out of Chancery directing the sheriff to attach the defendant to appear in the King's Bench to answer the plaintiff. The jurisdiction of the King's Court was based upon the commission of an act *vi et armis* and *contra pacem regis*, for which the unsuccessful defendant had to pay a fine. These words were therefore invariably inserted in the declaration. Indeed, the count in trespass was identical with the corresponding appeal, except that it omitted the offer of battle, concluded with an *ad damnum* clause, and substituted the words *vi et armis* for the words of felony, —*feloniter*, *felonice*, *in felonia*, or *in robberia*. The count in the appeal was doubtless borrowed from the ancient count in the popular or communal courts, the words of felony and *contra pacem regis* being added to bring the case within the jurisdiction of the royal courts.[2]

[1] The appellor succeeded in doing so in the case reported in Sel. Pl. Cor., 1 Seld. Soc'y, No. 192, and the champion with special leniency was condemned to the loss of one of his feet, instead of losing both foot and fist.

[2] As there was no appeal for a trespass upon land, Sel. Pl. Cor. (Seld. Soc'y), No. 35, the action of trespass *quare clausum fregit* was brought into the royal courts directly from the popular courts.

The procedure of the King's Courts was much more expeditious than in the popular courts, the trial was by jury[1] instead of by wager of law, and judgment was satisfied by levy of execution and sale of the defendant's property, whereas in the popular courts distress and outlawry were the limits of the plaintiff's rights. As an appeal might be brought for the theft of any chattel worth 12*d.* or more, and as the owner now had an option to bring trespass where an appeal would lie, there was danger that the royal courts would be encumbered with a mass of petty litigation. To meet this threatened evil the Statute 6 Ed. I. c. 8 was passed, providing that no one should have writs of trespass before justices unless he swore by his faith that the goods taken away were worth 40 shillings at the least.

The plaintiff's right in trespass being the same as the appellor's right in the appeal, we may consider them together. Bracton says the appeal is allowed "utrum res quae ita subtracta fuerit, extiterit illius appellantis propria vel alterius, dum tamen de custodia sua."[2] Britton and Fleta are to the same effect.[3] The right is defined with more precision in the "Mirror of Justices": "In these actions (appeals) two rights may be concerned, — the right of possession, as is the case where a thing is robbed or stolen from the possession of one who had no right of property in it (for instance, where the thing had been lent, bailed, or let); and the right of property, as is the case where a thing is stolen or robbed from the possession of one to whom the property in it belongs."[4] The gist of the plaintiff's right was, therefore, possession, either as owner or as bailee.[5] On the death of an owner in possession of a charter the heir was constructively in possession, and could maintain trespass against one who anticipated him in taking physical possession of the charter.[6]

The bailor could not maintain an appeal, nor could he maintain the analogous *Anefangsklage* of the earlier Teutonic law.[7] He had given up the possession to the bailee, retaining only a *chose* in

[1] In one case the defendant offered wager of battle and the plaintiff agreed, but the court would not allow it. Y. B. 32 & 33 Ed. I. 319.

[2] Bract. 151. To the same effect, Bract. 103 b, 146 a.

[3] 1 Nich. Britt. 56; Fleta, Lib. 1, c. 39. [4] Book II. c. 16 (Seld. Soc'y).

[5] For instances of appeals by bailees see Sel. Pleas of the Crown, Nos. 88 and 126, and for a recognition of the bailee's right in later times Fitz. Cor. 100 (45 Ed. III.); Y. B. 2 Ed. IV. f. 15, pl. 7; Keilw. 70, pl. 7.

[6] Y. B. 16 Ed. II. 490; Y. B. 1 Ed. III. f. 22, pl. 11. The owner could not have the action against a second trespasser, for the possession of the first trespasser, being adverse to owner, could not be regarded as constructively the owner's.

[7] 1 Brunner, Deutsche Rechtsgeschichte, 509.

action. For the same reason the bailor was not allowed, for many years, to recover damages in trespass. As early as 1323, however, and, doubtless, by the fiction that the possession of a bailee at will was the possession of the bailor also, the latter gained the right to bring trespass.[1] In 1375 Cavendish, J., said, "He who has property may have trespass, and he who has custody another writ of trespass." And Persay answered: "It is true, but he who recovers first shall oust the other of his action."[2] And this has been the law ever since where the bailment was at the will of the bailor. The innovation was not extended to the case of the pledgor,[3] or bailor for a term.[4]

This same distinction between a bailment at will and a bailment for a time is pointedly illustrated by the form of indictment for stealing goods from the bailee: "If the owner parts with the right of possession for a time, so as to be deprived of the legal power to resume the possession during that time, and the goods are stolen during that time, they cannot be described as the goods of such owner; but if the owner parts with nothing but the actual possession, and has a right to resume possession when he thinks fit, the goods may be described either as his goods, or his bailee's. . . . The ground of the decision in Rex *v.* Belstead and Rex *v.* Brunswick was that the owner had parted with the right of possession for the time, he had nothing but a reversionary interest, and could not have brought trespass."[5]

In like manner, it is probable that for an estray carried off trespass might have been brought by either the owner or the lord within the year and a day.[6] A servant could not bring trespass unless he had been intrusted with goods as a bailee by or for his master.[7] Nor could a servant maintain an appeal without his master.[8]

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[1] Y. B. 16 Ed. II. 490; Y. B. 5 Ed. III. f. 2, pl. 5.

[2] Y. B. 48 Ed. III. f. 20, pl. 16.

[3] Y. B. 10 Hen. VI. f. 25, pl. 16.

[4] Ward *v.* Macaulay, 4 T. R. 489.

[5] Per Bayley, B., as cited in 2 Russ. Crimes (5th ed.), 245. The same distinction is made in 1 Hale P. C. 513.

[6] Y. B. 20 Hen. VII. f. 1, pl. 1. But in this same case the right of a distrainor to have trespass was denied.

[7] Y. B. 2 Edw. IV. f. 15, pl. 7, per Littleton; Heydon's Case, 13 Rep. 69; Bloss *v.* Holman, Ow. 52, per Anderson, C. J.; Goulds, 66, pl. 10, 72, pl. 18, s. c.

[8] The master could bring an appeal against a thief and offer to prove by the body of his servant who saw the theft, and the servant would accordingly charge the appellee of the same theft, and offer to prove by his body. 1 Rot. Cur. Reg. 51; 3 Bract. Note Book, No. 1664. See also Y. B. 30 & 31 Ed. I. 542; Fitz. Replev. 32 (19 Ed. III.).

Trespass was an action for damages only,[1] *i. e.* a strictly personal action. But being a substitute for the appeal, which gave the successful appellor the stolen *res*, the measure of damages would naturally be the value of the stolen *res*. This was the rule of damages even though the action was brought by a bailee[2] or by a trespasser against a second trespasser. The rule was at one time thought to be so inflexible as to deprive a bailee for a time of the right to bring trespass for a wrongful dispossession by his bailor. Hankford, J., said in one case: "Plaintiff shall not have the action, because then he would recover damages to the value of the beasts from him who owned them, and this is not right. But the plaintiff shall have an action on the case. But if a stranger takes beasts in my custody I shall have trespass against him and recover their value, because I am chargeable to my bailor who has the property, but here the case is different *quod* Hill and Culpepper, JJ., *concesserunt*."[3] It is needless to say that this is no longer law. The plaintiff has for centuries been allowed to recover in trespass against the bailor his actual loss.[4] On the same principle it was once ruled that a plaintiff could not have trespass if his goods had been returned to him; "for, as Fulthorp, J., said, the plaintiff ought not to have his goods and recover value too, therefore he should recover damages in trespass on the case for the detainer."[5] But Paston, J., said the jurors should allow for the return of the chattel in assessing the damages, and his view has, of course, prevailed.[6]

The close kinship between the appeal and trespass explains the nature of the trespasser's wrong to the plaintiff. A robber or thief dispossesses the owner with the design of excluding him from all enjoyment of the chattel. His act is essentially the same as that of one who ejects another from his land, *i. e.*, a disseisin. Indeed, in many respects the recuperatory appeal of robbery or larceny is the analogue of the assize of novel disseisin. It is not surprising, therefore, to find that trespass for an asportation would not lie

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[1] Pl. Ab. 336, col. 2, rot. 69 (14 Ed. II.); ibid. 346, col. 2, rot. 60 (17 Ed. II.); Y. B. 1 Hen. IV. f. 4, pl. 5.

[2] Y. B. 11 Hen. IV. f. 23, pl. 46; Y. B. 8 Ed. IV. f. 6, pl. 5; Heydon's Case, 13 Rep. 67, 69; Swire *v.* Leach, 18 C. B. N. S. 479. There are numerous cases in this country to the same effect. See, however, Claridge *v.* South Staffordshire Co., '92, 1 Q. B. 422.

[3] Y. B. 11 Hen. IV. f. 23, pl. 46.

[4] Heydon's Case, 13 Rep. 67, 69; Brierly *v.* Kendall, 17 Q. B. 937.

[5] Y. B. 21 Hen. VI. f. 15, pl. 29.

[6] Br. Ab. Tresp. 221, 130; Chinnery *v.* Vial, 5 H. & N. 288, 295. See also Y. B. 21 & 22 Ed. I. 589.

originally except for such a dispossession as in the case of land would amount to a disseisin.[1] If, for instance, a chattel was taken as a distress, trespass could not be maintained.[2] Replevin was the sole remedy. In 1447 the Commons prayed for the right to have trespass in case of distress where the goods could not be come at.[3]

In one respect trespass differed materially from the appeal and also from the assize of novel disseisin. The disseisee and the owner of the chattel could recover the land or the chattel from the grantee of the disseisor or thief. But the dispossessed owner of a chattel could not bring trespass for the value of the chattel against the grantee of the trespasser.[4] Even here, however, the analogy did not really fail. Trespass was an action to recover damages for a wrong done to the plaintiff by taking the chattel from his possession. The grantee of the trespasser had done no such wrong. Therefore, no damages were recoverable, and the action failed altogether. Similarly the grantee of the disseisor had done no wrong to the disseisee, and therefore, while he must surrender the land, he was not obliged, prior to the Statute of Gloucester, to pay damages to the demandant.[5] On the contrary, the demandant was in *misericordia* if he charged the grantee with disseisin.[6] By the same reasoning, just as the dispossessed owner of a chattel could not have trespass against a second trespasser,[7] so the demandant could not recover damages from a second disseisor.[8] The wrong in each case was against the first trespasser or disseisor, who had gained the fee simple or property, although a tortious fee simple or property.

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[1] Trespass for the destruction of a chattel has been allowed from very early times. Y. B. 1 Ed. II. 41; Y. B. 11 Ed. II. 344; Y. B. 2 Ed. III. f. 2, pl. 5; Watson *v.* Smith, Cro. El. 723. There is in the *Registrum Brevium* no writ of trespass for a mere injury to a chattel, not amounting to its destruction. Presumably it was thought best that plaintiffs should seek redress for such minor injuries in the popular courts. There is an instance of such an action in 1247 in a manorial court of the Abbey of Bec. Sel. Pl. Man. Ct. (Seld. Soc'y) 10. In later times the remedy in the King's Bench was by an action on the case. Slater *v.* Swan, 2 Stra. 872. See also Marlow *v.* Weekes, Barnes' Notes, 452. Finally, trespass was allowed without question raised. Dand *v.* Sexton, 3 T. R. 37.

[2] Pl. Ab. 265, col. 2, rot. 8 (32 Ed. I.).

[3] 5 Rot. Parl. 139 b. (399 a seems to be the same petition.)

[4] Y. B. 21 Ed. IV. f. 74, pl. 6; Day *v.* Austin, Ow. 70; Wilson *v.* Barker, 4 B. & Ad. 614.

[5] Bract. 164, 172, 175 b; 2 Bract. Note Book, No. 617; Y. B. 37 Hen. VI. f. 35, pl. 22; Y. B. 13 Hen. VII. f. 15, pl. 11; Symons *v.* Symons, Hetl. 66.

[6] 2 Bract. Note Book, Nos. 617 and 1191.

[7] Y. B. 21 Ed. IV. f. 74, pl. 6. See the HARVARD LAW REVIEW, Vol. III. p. 29.

[8] Br. 172.

The view here suggested, that the defendant's act in trespass *de bonis asportatis* was essentially the same as that of a disseisor in the case of land, has put the writer upon the track of what he believes to be the origin of the familiar distinction in the law of trespass *ab initio* between the abuse of an authority given by law, and the abuse of an authority given by the party, the abuse making one a trespasser *ab initio* in the one case but not in the other. As we have seen, replevin, and not trespass, was the proper action for a wrongful distress. If, however, when the sheriff came to replevy the goods, the landlord, claiming the goods as his own, refused to give them up, the replevin suit could not go on; the plaintiff must proceed either by appeal of felony, or by trespass.[1] The defendant by this assumption of dominion over the goods and repudiation of the plaintiff's right was guilty of a larceny and trespass. Even if the defendant allowed the sheriff to replevy the goods, he might afterwards in court stop the action by a mere assertion, without proof, of ownership. The plaintiff as before was driven to his appeal or trespass.[2]

Early in the reign of Edward III. the law was so far changed that the defendant's claim of ownership would not defeat the replevin action unless made before deliverence of the goods to the sheriff.[3] But the old rule continued, if the distrainor claimed ownership before the sheriff, until, by the new writ, *de proprietate probanda*, the plaintiff procured a deliverance in spite of the defendant's claim, and thus was enabled to continue the replevin action as in the case of a voluntary deliverance. But the resort to this writ was optional with the plaintiff. He might still, if he preferred, treat the recusant defendant as a trespasser. In Rolle's Abridgment we read: "If he who has distrained detains the beasts

[1] "If the taker or detainer admit the bailiff to view, and avow the thing distrained to be his property, so that the plaintiff has nothing therein, then the jurisdiction of the sheriff and bailiff ceases. And if the plaintiff is not a villein of the deforcer, let him immediately raise hue and cry; and at the first county court let him sue for his chattel, as being robbed from him, by appeal of felony if he thinks fit to do so." 1 Nich. Britt. 138. In Y. B. 21 & 22 Ed. I. 106, counsel being asked why the distrainor did not avow ownership when the sheriff came, answered: "If we had avowed ownership he would have sued an appeal against us."

[2] Y. B. 32 & 33 Ed. I. 54.

[3] The argument of the defendant, "And although we are come to court on your suit, we shall not be in a worse plight here than before the sheriff; for you shall be driven to your writ of trespass or to your appeal, and this writ shall abate," though supported by the precedents, was overruled. Y. B. 5 Ed. III. f. 3, pl. 11; see the HARVARD LAW REVIEW, Vol. III. 32.

after amends tendered before impounding, he is a trespasser *ab initio*. 45 Ed. III. 9 b. *Contra*, Co. 8, Six carpenters, 147." [1]

What was true in the case of a distress was equally true of an estray. "If the lord avow it to be his own, the person demanding it may either bring an action to recover his beast as lost (*adirree*) in form of trespass, or an appeal of larceny, by words of felony." [2] In 1454 Prisot, J., in answer to counsel's suggestion that, if he lost a box of charters, he should have detinue, said: "I think not, for in your case you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong, but the tort began with the detention after notice." [3]

On the other hand, a bailee who, in repudiation of his bailor's rights, refused to give back the chattel on request was never chargeable as a thief or trespasser.[4] Unlike the distrainor or finder, who took the chattel without the consent of the owner but by virtue of a rule of law, the bailee did not acquire the possession by a taking, but by the permission and delivery of the bailor. Hence it was natural to say that a subsequent tort made one a trespasser *ab initio* if he came to the possession of a chattel by act of law, but not if he came to its possession by act of the party. The rule once established in regard to chattels was then extended to trespasses upon realty and to the person.

The subsequent history of the doctrine of trespass *ab initio* is certainly curious. There seems to be no indication in the old books that anything but a refusal to give up the chattel would make the distrainor or finder a trespasser. But in the case, in which Prisot, C. J., gave the opinion already quoted, Littleton, of counsel, insisted that detinue and not trespass was the proper action against the distrainor or finder for refusal to give up the chattel on demand, but admitted that trespass would lie if they killed or used the chattel.[5]

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[1] 2 Roll. Ab. 561 [G], 7. The Year Book supports Rolle.

[2] I Nich. Britt. 68. See ibid. 215: "No person can detain from another birds or beasts, *ferae naturae*, which have been domesticated, without being guilty of robbery or of open trespass against our peace, if due pursuit be made thereof within the year and day, to prevent their being claimed as estrays."

[3] Y. B. 33 Hen. VI. f. 26, pl. 12.

[4] Y. B. 16 Hen. VII. f. 2, pl. 7; 1 Ames & Smith, Cases on Torts, 252, 253, n. 1.

[5] "If I refuse to give up the distress, still he shall not have trespass against me, but detinue, because it was lawful at the beginning when I took the distress; but if I kill them or work them for my own account, he shall have trespass. So here, when he found the charters it was lawful, and although he did not give them up on request, he

Littleton's view did not at once prevail.[1] But it received the sanction of Coke, who said that a denial, being only a non-feasance, could not make one a trespasser *ab initio*;[2] and their opinion has ever since been the established law. A singular departure this of Littleton and Coke from the ancient ways — the doctrine of trespass *ab initio* inapplicable to the very cases in which it had its origin!

J. B. Ames.

[*To be continued.*]

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shall not have trespass, but detinue against me, for no trespass is done yet; no more than where one delivers goods to me to keep and redeliver to him, and I detain them, he shall never have trespass, but detinue against me *causa qua supra*." Y. B. 33 Hen. VI. f. 26, pl. 12.

[1] See Littleton's own statement when judge in Y. B. 13 Ed. IV. f. 6, pl. 2. According to Y. B. 2 Rich. III. f. 15, pl. 39: "It was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will, or a writ of detinue." In East *v.* Newman (1595), Golds. 152, pl. 79, a finder who refused to give up the goods to the owner was held guilty of a conversion, Fenner, J., saying: "For when I lose my goods, and they come to your hands by finding, and you deny to deliver them to me, I shall have an action of trespass against you, as 33 Hen. VI. is."

[2] Isaac *v.* Clark, 1 Roll. R. 126.